

Time

Place

May 21 - 7:00-10:00 p.m.
May 22 - 9:00 a.m.-5:00 p.m.

State Bar Building
1230 W. Third Street
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

May 21-22

Bring the following materials to the meeting (in addition to other items listed on agenda):

- (1) Report of New Jersey Supreme Court Committee on Evidence (you have a copy)
- (2) Printed pamphlets containing tentative recommendations and studies on:
 - a. Hearsay Evidence
 - b. Authentication and Content of Writings
 - c. Privileges
 - d. Witnesses
 - e. Extrinsic Policies Affecting Admissibility
- (3) Tentative Mimeographed Recommendations (New material contained in a soft-cover binder) (sent 5/13/64)
- (4) New Evidence Code (New material contained in a loose-leaf binder) (sent 5/13/64)
- (5) Professor Degnan's Research Study (Contained in a soft-cover binder) (sent 5/13/64)

AGENDA ITEMS

Thursday evening May 21

1. Approval of Minutes for April 1964 Meeting (sent 4/30/64)
2. Administrative Matters
 - a. Approval of dates for future meetings

June 12-13 (Friday evening and Saturday) (San Francisco)
July 23-25 (Three full days) (Los Angeles)
August 13-15 (Los Angeles)
September 10-12 (San Francisco)
State Bar Convention ? (September 28-October 2)

- b. Memorandum 64-35 (Research Services) (sent 5/13/64)

3. Study No. 36(L) - Condemnation Law and Procedure

Memorandum 64-28 (sent 5/13/64)

4. Organization and Content of New Evidence Code

a. Memorandum 64-30 (Forwarding New Evidence Code and containing comments pertinent thereto) (sent 5/13/64)

b. Existing statutes to be included in Evidence Code or Repealed

Memorandum 64-33 (enclosed)

Memorandum 64-26 (enclosed)

Memorandum 64-25 (enclosed)

Friday, May 22

5. Tentative Recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions

Memorandum 64-29 (Extra copy of tentative recommendation attached) (enclosed)

6. Revisions of New Evidence Code

Memorandum 64-31 (Hearsay Evidence) (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

May 21 and 22, 1964

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on May 21 and 22, 1964.

Present: John R. McDonough, Jr., Chairman
Richard H. Keatinge, Vice Chairman
Joseph A. Ball (May 22 only)
James R. Edwards
Sho Sato
Herman F. Selvin
Thomas E. Stanton, Jr.

Absent: Hon. James A. Cobey
Hon. Alfred H. Song
Angus C. Morrison, ex officio

Messrs. John H. DeMouilly, Joseph B. Harvey, and Jon D. Smock of the Commission's staff, and the Commission's research consultant on the Uniform Rules of Evidence, Professor Ronan E. Degnan, were also present. Mr. Warren P. Marsden, representing the Judicial Council, and Mr. Joseph Powers, representing the Association of District Attorneys, also were present.

ADMINISTRATIVE MATTERS

Minutes of April 1964 Meeting. The Commission approved the Minutes of the April 1964 meeting as submitted.

Future Meetings. Future meetings of the Commission are now scheduled as follows:

June 12 (evening) and 13	San Francisco
July 23 (all day), 24, and 25	Los Angeles (U.S.C.)
August 13-15	Los Angeles
September 10-12	San Francisco

The Commission determined not to meet during the State Bar Convention.

Study No. 45--Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised. The Executive Secretary reported that the Commission made an agreement a number of years ago with Dean Orrin B. Evans to prepare a research study on this topic. He failed to prepare the study within two years after the agreement was made and the funds reverted to the General Fund. The Commission made a new agreement-- Agreement Number 1960-61(9), dated June 15, 1961--giving Dean Evans more time to prepare the study, but he has failed to prepare it and the funds encumbered to pay for the study have reverted to the General Fund.

The Executive Secretary reported that Dean Evans has decided that he will not be able to prepare a study on this subject, and he has signed an agreement terminating his obligation to prepare the study and terminating the State's obligation to pay for the study when completed.

A motion made by Commissioner Edwards, seconded by Commissioner Sato, that Agreement Number 1960-61(9), dated June 15, 1961, be terminated, was unanimously adopted that the Chairman be authorized to execute an agreement on behalf of the Commission terminating Agreement Number 1960-61(9).

Index for Volume 6. The Executive Secretary reported that the Commission plans to publish Volume 6 (containing the nine tentative recommendations relating to the Uniform Rules of Evidence) prior to the 1965 legislative session. This volume will consist of approximately 1,100 pages. The staff will not have time to prepare an index for the volume, although the staff plans to prepare the various tables that will be included in the volume.

The Executive Secretary reported that Mrs. Margaret Loftus, who has indexed volumes for the Continuing Education of the Bar, has expressed a willingness to index Volume 6 for \$800.00.

A motion was made by Commissioner Sato, seconded by Commissioner Edwards, and unanimously adopted that an Agreement be made with Mrs. Margaret Loftus to index Volume 6 for \$800.00 and that the Chairman be authorized to execute such agreement on behalf of the Commission.

Research Contract With Stanford University. The Commission considered a staff suggestion that a research contract for the 1964-65 fiscal year be made with Stanford University in the amount of \$500. Later, when a long-term lease for office space at Stanford has been negotiated, this amount can be increased if necessary. A motion was made by Commissioner Edwards, seconded by Commissioner Sato, and unanimously adopted that a research contract, in the same form as the contract for the 1963-64 fiscal year, in the amount of \$500 be made with Stanford University and that the Chairman be authorized to execute such contract on behalf of the Commission.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE

ORGANIZATION OF NEW EVIDENCE CODE

The Commission considered Memorandum 64-30 and the new Evidence Code. No changes were made in the organization of the new code except as determined in connection with particular portions of the statute hereinafter indicated.

EXISTING STATUTES TO BE INCLUDED IN EVIDENCE CODE OR REPEALED

The Commission considered Memoranda 64-33 and 64-26 and Part IV of Professor Degnan's Research Study.

Section 1844

This section is to be compiled in the Evidence Code, to read substantially as follows:

(a) Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

(b) As used in this section, "direct evidence" means evidence that directly proves a disputed fact that is of consequence to the determination of the action, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Section 1847

The repeal of this section was approved. The provision that the jury is the exclusive judge of credibility is to be added to Evidence Code Section 330 for consideration in connection with that section.

Section 1856

This section states the Parole Evidence Rule. The section is to remain in the C.C.P. and Section 1430 of the Evidence Code is to be deleted. Consideration should be given to rephrasing Section 1856 so that it does not refer to evidence.

Section 1903

This section is to be repealed. The reasons for its repeal are given on pages 65-66 of Professor Degnan's research study.

Sections 1904-1917

The previous decision to retain these sections without change in the Code of Civil Procedure was reaffirmed.

Sections 1919a and 1919b

These sections are to be repealed and the substance of the following is to be included in the new Evidence Code:

1. The comment to the Business Records as Evidence Act should make it clear that church records are business records. The comment should be written so that it will not operate to restrict the definition of "a business" to the types of activities listed in the comment. Note that the record would cover only the "act, condition, or event" that is recorded, such as the date and fact of baptism, but would not include date of birth as stated by the baptismal certificate or record.

It was suggested that a separate chapter be contained in the Evidence Statute on Business Records, with an article on Business Records Generally, and additional articles on Church Records and Hospital Records.

2. When the record thereof is proved in the manner provided for proving a business record, a recital contained in a church record concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage, or other similar fact of family history is admissible to prove the truth of the recital. The equivalent of Rule 64 should be added to the provision drafted to make these recitals admissible.

3. Section 1275 of the Evidence Code (relating to marriage certificates) is to be broadened to permit admission of any recital contained in an original certificate issued by a clergyman (baptismal, marriage, confirmation, or similar certificate) to prove birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage, or other similar fact of family history.

Section 1920

This section is to be repealed. See discussion in research study concerning Section 1926 (pages 71-72).

In so far as Section 1920 makes public records prima facie evidence, the provision is undesirable since it gives a presumptive effect to such records. The comment to the repeal of Section 1920 should state this as a reason for the repeal of the section.

Section 1925

The repeal of this section was approved and Section 1553 of the Evidence Code was approved.

Section 1926

The repeal of this section, including repeal of its prima facie evidence effect, was approved. See discussion of Section 1920 above.

Section 1927

The repeal of this section was approved and Section 1551 of the Evidence Code was approved.

Section 1927.5

The repeal of this section was approved and Section 1550 of the Evidence

Code was approved after the words "in all courts of this State" were deleted as unnecessary.

Section 1928

The repeal of this section was approved and Section 1552 of the Evidence Code was approved.

Sections 1928.1 to 1928.4

The repeal of Sections 1928.1 to 1928.4 was approved.

Section 1500 of the Evidence Code was approved after the following changes were made:

(1) The words "as enacted or as heretofore or hereafter amended" were substituted for "as it read on May 3, 1945, or as now or hereafter amended."

(2) The words "shall be received in any court, office, or other place in this State" were substituted for "is admissible."

Section 1501 of the Evidence Code was approved after "shall be received in any court, office, or other place in this State" were substituted for "is admissible."

Section 1502 of the Evidence Code is to be considered in connection with the provisions on authentication.

Section 1933

This section is to be retained in the C.C.P. without change.

Section 1936

The repeal of this section was previously approved.

Section 1946

The repeal of this section was previously approved. This decision was reconsidered and the repeal of the section again approved with a recognition

that the repeal results in the evidence admissible under Section 1946 not being given prima facie weight.

Section 1948

This section, which is compiled as Section 1450 of the Evidence Code, is an authentication provision and should be included in the authentication provisions of the Evidence Code and phrased to indicate that it deals only with authentication. The section also permits use of hearsay to authenticate the writing and this aspect of the section also should be retained.

The material relating to "execution" of the writing is to be deleted.

Section 1951

This section is to be repealed. Section 1451 of the Evidence Code is to be revised to make paragraph (a) an authentication provision (like the provision that will result from C.C.P. Section 1948). Paragraph (b) is to be considered in connection with the hearsay exception for public records and for writings affecting property interests and to be deleted if it is unnecessary to provide a hearsay exception and if it is unnecessary for the purposes of providing an exception to the best evidence rule.

Sections 1957, 1958, and 1960

The decision to repeal these sections was reaffirmed.

Section 1967

This section is to be repealed as unnecessary.

Section 1968

This section is to be repealed as unnecessary. It duplicates Penal Code provisions.

Sections 1971 and 1972

These are Statute of Frauds sections and should be retained without change in the C.C.P. Section 1402 should be deleted from the Evidence Code.

Section 1973

This is the basic Statute of Frauds section. It should be repealed since it is substantially duplicated by a section in the Civil Code. Section 1400 of the Evidence Code should be deleted.

Section 1974

This is a Statute of Frauds section and should be retained in the C.C.P. Consideration should be given to rephrasing the section so that it does not deal with evidence. Section 1401 should be deleted from the Evidence Code.

Section 1978

This section should be repealed. It declares an undesirable rule that prevents the court from upsetting a jury verdict where no reasonable man could find as did the jury.

Sections 1550-1553 of the Evidence Code

The text of these sections is to be sent to the California Land Title Association for comment.

BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

The Commission considered Memorandum 64-29, the first supplement to Memorandum 64-29, and the Tentative Recommendation relating to Burden of Producing Evidence, Burden of Proof, and Presumptions (May 8, 1964, draft).

The following actions were taken:

Section 511

Section 511 was approved after the word "establish" was changed to "raise" in the last line of the section.

Section 523

Section 523 was disapproved. The section on which it was based, Code of Civil Procedure Section 1983, is to be repealed.

Section 600-606

The Commission considered the operation of presumptions in criminal cases. The staff was instructed to delete the second sentence of Section 606 (which relates to presumptions in criminal actions) and to draft a provision that will read in substance as follows:

When by statute or other rule of law a presumption is available to the prosecution to prove an element of crime in a criminal action, the jury shall be told that if they believe that the basic facts of the presumption are proved beyond a reasonable doubt, the law permits them to find that the presumed fact has also been proved beyond a reasonable doubt.

The Commission disapproved the provisions of Sections 600-606 that placed either the burden of proof or the burden of producing evidence on the defendant and required the jury to find the presumed fact upon the establishment of the basic fact insofar as their application to the facts essential to a defendant's guilt are concerned. However, this action does not affect Section 511 (which was approved after the action in regard to presumptions was taken), and a

statute worded in terms of burden of proof may still require a defendant to raise a reasonable doubt as to his guilt on the issue (if the issue is one other than his sanity) and may require a defendant to prove his insanity by a preponderance of the evidence.

Section 603

Section 603 was approved after it was revised to read as follows:

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy except to facilitate the determination of the particular action in which the presumption is applied.

Section 604

Section 604 was approved after it was revised to read as follows:

604. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

Section 605

The staff was instructed to substitute the substance of Section 603 for the cross reference to the section. Subject to this revision, the section was approved.

Section 606

Section 606 was approved after it was revised to read:

606. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the existence of the presumed fact.

Section 607

Section 607 was approved after it was revised to read substantially as follows:

607. A matter listed in former Section 1963 of the Code of Civil Procedure, as set out in Section 1 of Chapter 860 of the Statutes of

1955, is not a presumption unless declared to be a presumption by statute. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate in any case to which a provision of former Section 1963 would have applied.

Section 620

Section 620 was approved after it was revised to read:

620. The presumptions in this article and all other presumptions declared to be conclusive by statute or other rule of law are conclusive presumptions.

Section 621

Section 621 was approved after it was revised to read:

621. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.

Sections 622, 623, 624

These sections were approved in the form in which they appear in the tentative recommendation. No change is to be made in the language of the sections to make them read more nearly like presumptions.

Section 630

Section 630 was approved after it was revised to read:

630. The presumptions in this article and other presumptions described by Section 603 are presumptions affecting the burden of producing evidence.

Section 646

Section 646 was disapproved. The doctrine of res ipsa loquitur is to be left to common law development.

Section 660

Section 660 was approved after it was revised to read:

660. The presumptions in this article and other presumptions described by Section 605 are presumptions affecting the burden of proof.

Section 661

Section 661 was approved after it was revised to read:

561. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code, or by the husband or wife or the descendant of one or both of them. In a civil action, the presumption may be rebutted only by clear and convincing proof.

Section 664

Section 664 was deleted as unnecessary. The de facto officer doctrine would apply in any case in which the presumption could be applied.

Section 665

Section 665 was approved after it was revised to read:

665. It is presumed that official duty has been regularly performed.

New Section

The staff was directed to include in the article listing presumptions affecting the burden of proof the presumption that an arrest without process is unlawful.

Civil Code Section 164.5

Proposed Section 164.5 of the Civil Code was approved.

Civil Code Section 3546

The proposed maxim that "Acquiescence follows from belief that the thing acquiesced in is conformable to the right or fact" was disapproved. A maxim that "The law has been obeyed" was substituted.

Amendments and Repeals

The remainder of the proposed additional sections, repealed sections, and amendments were approved.

Minutes - Regular Meeting
May 21 and 22, 1964

STUDY NO. 36(L) - CONDEMNATION LAW AND PROCEDURE

The Commission considered Memorandum 64-28 and determined not to make any recommendation on the right to immediate possession to the 1965 legislative session.